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Supreme Court, U.S.
FILED

No. 101048 FEB 17 2011

OFFICE OF THE CLERK

In the

Supreme Court of the United States

JIEN-RON ZHANG,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Charles Christophe, Esq.
Counsel of Record
CHRISTOPHE & ASSOCIATES, P.C.
2 Wall Street, 8th Floor
New York, New York 10005
(212) 344-3800
christopheesq@aol.com

Counsel for Petitioner

February 17, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Did the Second Circuit Court of Appeals deny petitioner his fundamental rights to due process under the Fifth Amendment by affirming the decision of the Board of Immigration Appeals in an egregious departure from the accepted and usual course of judicial proceedings?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jien Ron Zhang, asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, *Jien Ron Zhang v. Eric H. Holder, Jr., Attorney General of the United States*, Docket No. 09-0638 (2d Cir. 2010), issued by granting Respondent's motion for summary denial, is attached to this petition as **Appendix B**. The agency opinions issued by the Immigration Judge, then adopted and affirmed by the Board of Immigration Appeals, *In re Jien Ron Zhang*, No. 071-569-045 (Immigration Judge June 9, 2006) (BIA January 30, 2009), are attached hereto as **Appendices C and D**.

STATEMENT OF JURISDICTION

The Court of Appeals for the Second Circuit denied Zhang's timely motion to reconsider on November 23, 2010. A copy of said decision is attached hereto as **Appendix A**. This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254, as the decisions below served to deprive Mr. Zhang of his rights as granted under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter *sub judice* are the Fifth Amendment rights granted to aliens seeking relief

from the Courts of the United States, which Amendment states, in pertinent part, that "No person...shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The Petitioner, Mr. Zhang, is a native and citizen of the People's Republic of China (hereinafter "China"). Mr. Zhang was born on September 20, 1974 in Yongjia, China. He arrived in the United States in October 19, 1991. He was married to Sai Wei Xia on July 7, 2000. There are two children from the marriage, both born in the United States. Mr. Zhang has a son, Donny, born on July 21, 2000, and a daughter, Lina, born on August 9, 2005.

Mr. Zhang's daughter suffers from significant debilitating physical conditions, including blindness, a heart condition, and problems with her intestinal tract. Petitioner's daughter receives physical therapy eight times a week. She is also being treated at a hospital. Mr. Zhang desires more children, and he fears returning to China because he fears sterilization upon his return for violating China's coercive family planning policy.

Mr. Zhang holds a well founded fear that he will be forced to undergo a sterilization procedure if forced to return to China. His fear is legitimated by the widespread perpetration of human rights violations by the Chinese government in its efforts to enforce its barbaric birth control regulations. The persecution of individuals such as Mr. Zhang, namely individuals whose political opposition to the family planning regulation is or will be known to the government as a

result of their violation of same, is well documented by the evidence in the record and forms the basis for his well-founded fear that he will be persecuted if forced to return to China.

Mr. Zhang maintains a well founded fear that he will be forced to undergo a sterilization procedure if forced to return to China.

In spite of Mr. Zhang's compelling case for withholding of removal, the Board of Immigration Appeals affirmed the decision of the Immigration Judge. This decision was erroneously upheld by the Second Circuit Court of Appeals when they granted Respondent's motion for summary denial of the petition for review, not even affording Petitioner the opportunity to present the issues through briefing.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case was an egregious departure from the accepted and usual course of judicial proceedings.

A. Summary Disposition Was Not Appropriate In This Case Because Petitioner Provided Evidence Sufficient To Meet The Test Provided in the Second Circuit Decision, *Shao v. Mukasey*.

The Second Circuit's Decision in *Shao v. Mukasey*, 546 F.3d 138, 143 (2d Cir. 2008) affirmed the holdings of the Board of Immigration Appeals in *Matter of J-H-S-*, 24 I. & N. Dec. 196 (BIA 2007); *Matter of J-W-S-*, 24 I. & N. Dec. 185 (BIA 2007); and *Matter of S-Y-G-*, 24 I. & N. Dec. 247 (BIA 2007). The common question

addressed in these cases is: under what circumstances can a Chinese national rely on the birth of more than one child to demonstrate the well-founded fear of persecution necessary to qualify for asylum as a refugee? The Second Circuit, in *Shao*, held that the Chinese national did not meet her burden of demonstrating an objectively reasonable fear of persecution, and that a case-by-case review is necessary.

In the instant matter, granting Respondent's motion for summary denial was in error, as the entirety of this Second Circuit's decisions was that "Petitioner's arguments are foreclosed by this Court's decision in *Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008)." See **Appendix B**.

The Second Circuit's finding that Petitioner's arguments be foreclosed by *Shao* is in contradiction to its own finding that a case by case review is necessary. In addition, summary affirmance was not appropriate, since it cannot be fairly said that this petition for review lacks an arguable basis in law or fact. *See Pillory v. INS*, 45 F.3d 14, 16-17 (2d Cir. 1995)

The three part analysis created in these precedential decisions states that it must be determined 1) whether there is objective evidence supporting the fear of future persecution (proof of the details of the family planning policy relevant to each individual case; 2) whether the facts in the record establish that the alien violated the policy applicable to his circumstances; and 3) whether it is established that the violation of the family planning policy would be punishable in the local area in a way that would give rise to an objective fear of future persecution.

i. There Is A Government Policy Implicated By The Births At Issue.

Petitioner submitted an Official Directive from Lianjiang county's Township Committee dated December 27, 2005, which states that "To those returning overseas Chinese (sic), if they have child (children) born in China or abroad ... they shall be included in our town's family planning goal and should be managed according to current family planning management methods."

According to documents in the record, Fujian Province has limited exceptions which allow the birth of a second child. "In rural areas a couple who already have a child may be authorized to have a second if exception circumstances are established..." The exceptional circumstances are deformities in the first child or birth of a female as the first child. There are no exceptions which allow a second birth where "the first child is already a male."

Petitioner's first child is male. By having a second child he violated the birth control policy at issue. By having a second child and wanting to have additional children he is asserting his political opinion in opposition to China's birth control policy.

ii. The Government of China Would View the Births At Issues As Violative Of The Family Planning Policy Established By Fujian Province.

Petitioner has two children from his marriage, a son born on July 21, 2000, and a daughter born on August 9, 2005. In 2006, The Second Circuit, in its

decision in *Guo v. Gonzales*, 463 F.3d 109 (2d Cir. 2006) gave deference to the questions raised by evidence and documentation which substantiates that the birth of two children or more may expose a Chinese person to harm if forced to return to the People's Republic of China (PRC). Other decisions from the Second Circuit have followed suit. See *Lin v. Gonzales*, 468 F.3d 167 (2d Cir. 2006). In *Guo*, the court analyzed 2003 decisions from the Changle City Family-Planning Administration and the Fujian Province Department of Family-Planning Administration.

"These decisions dealt with the sanctions applicable to Chinese nationals who had given birth to a child while living abroad. The first stated that "where either parent remains a Chinese national and citizen with no permanent residence overseas, any child of such a couple . . . is deemed a Chinese national and shall not be treated as [a] foreign national or citizen for domestic administrative purposes." The decision cautioned that Chinese nationals engaging in "any reproductive behavior in violation of family-planning enforcement in China" will be sanctioned according to family-planning rules and regulations enforced at the local level, subject to exceptions for those having a permanent residence overseas or a temporary visa for at least a three year stay.

The Fujian Province Department of Family-Planning Administration affirmed the Changle City opinion. Subject to the same exceptions noted above, the Fujian Province decision concluded: [N]o exception or waiver shall be applicable to Chinese nationals and citizens who engage in reproductive behavior overseas in violation of family-planning regulations as enforced in his or her area of residence of household

registration in China . . . . Such Chinese nationals and citizens shall be subject to family-planning enforcement upon resettlement in China." *Guo*, 463 F.3d 109 (2d Cir. 2006)

Since Petitioner's children will be treated as Chinese nationals, and he had a second child after having had a male child, Chinese officials would view his actions as violative of the population and family planning ordinance of Fujian Province.

iii. The Enforcement Means That Would Apply To The Perceived Violation Would Amount To Persecution.

Mr. Zhang has a well-founded fear of future persecution since he fathered a second child after having had a male child and, thus, has violated the Population Control Policy of China. Through the enactment of IIRAIRA § 601(a), the definition of "refugee" was amended so that an individual victimized under the China's coercive population control policy, regardless of the persecutor's motivation qualified for asylum:

> [A] person who has been forced to abort a pregnancy or to undergoing voluntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a

well founded fear of persecution on account of political opinion.

In the instant case, Petitioner falls squarely within the amended definition of refugee. He is a refugee because he has a well-founded fear that he will be persecuted by the Chinese government based on his political opinion and opposition of the Chinese coercive Family Planning Policy. *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989).

The enforcement means that Mr. Zhang believes would apply to his violation of the family planning policy, forced sterilization, amounts to persecution under the Immigration and Nationality Act. He bases this belief on the forced sterilization suffered by his mother-in-law, and the affidavit of John Shields Aird, which clearly concludes that "the Chinese family planning program is intentionally coercive as a matter of national policy." Mr. Aird states further that claims that sterilizations in China are strictly voluntary are not credible. In fact, "The Chinese Government DOES NOT prohibit the use of force – it explicitly encourages it."

The foregoing demonstrates that Petitioner is unable to return to China because of this well founded fear of persecution. Thus, Petitioner's application for asylum and withholding of removal should be granted.

Petitioner is still a citizen of China and thus is subject to its laws. If forced to return to China, it is likely that he will suffer persecution. Thus, the BIA erred in affirming the IJ's decisions denying his applications for political asylum and withholding of

removal. The Second Circuit erred in denying the Petition for Review without fully examining the record.

B. Petitioner Meets The Standard Of Showing A Well-Founded Fear Of Persecution In China Set Forth In *Matter of Mogharrabi.*

The appropriate standard for establishing an individualized well-founded fear of persecution is whether an objectively reasonable person in Petitioner's circumstances would fear persecution. *See Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); *see also Carcamo-Flores v. INS*, 805 F.2d 60 (2d Cir. 1986). This standard is also satisfied in finding that a reasonable person would hold such a fear, even where the likelihood of such persecution is significantly less than clearly probable. *See, Mogharrabi*, 19 I. & N. Dec. 439, 442 (BIA 1987).

To meet the standard of a subjectively held well-founded fear of persecution, the refugee must satisfy a four-part conjunctive test requiring that (1) he or she possesses a belief or characteristic a persecutor seeks to overcome in others by means of some sort of punishment; (2) the persecutor is already aware, or could become aware, that the refugee possesses this belief or characteristic; and the persecutor has both (3) the capability and (4) the inclination to punish the refugee. *See, Matter of Mogharrabi, supra*, at 439. Meeting this standard is made easier where the country at issue has a history of persecuting people in situations similar to the applicant's. Id. at 446. In such situations, the Court can find the applicant's well-founded fear to be properly based on what has happened to others.

In the instant case, Petitioner possesses a belief or characteristic a persecutor seeks to overcome. Specifically, Petitioner violated the Birth Control Policy by fathering a second child after having fathered a male child. The persecutor, in this case, the Chinese government, will become aware of this fact should Petitioner and his family be returned to China.

The Chinese government, as a persecutor, has both the capability and the inclination to punish the Petitioner. In support of this argument, Petitioner submitted an affidavit from noted demographer John Shields Aird, which documents abuses by the Chinese government in enforcing its coercive family planning policy. He reports that "on May 19, 2001, an *Agence France Presse* dispatch described the case of a woman from southeastern Fujian Province who was beaten to death the week before for refusing to submit to sterilization..." In addition he observes that "Fines often accompany forced sterilizations, but it is the sterilizations which have the major deterrent force in the system of intimidation that underlies family planning enforcement in China."

After recounting the history of China's enforcement of its family planning policies, Mr. Aird was compelled to conclude:

> The evidence throughout the 1990's and up to the present moment shows that the central authorities are determined to maintain their control over family planning work to guarantee China's low birth rate. They have made it clear that these efforts are to continue through the 21st century. Coercive measured are to be refined and "perfected," ... but the program

> must remain coercive because without coercion it does not get the intended results. Therefore it is to be expected that persecution under the program will go on...

In light of the foregoing, Petitioner meets the standard of a well-founded fear of persecution stated under *Matter of Mogharrabi* and is eligible for relief of political asylum under INA § 208 and withholding of removal under INA § 241(b)(3).

C. Petitioner Met His Burden Of Proof And Qualifies For Withholding Of Removal Because It Is More Likely Than Not That He Will Be Persecuted If Forced To Return To China.

While asylum and withholding of removal are "closely related" forms of relief, the latter requires the alien to meet a stricter evidentiary standard. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443-50 (1987); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995); *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 339. Indeed, an alien's failure to meet the standards of eligibility for asylum can show that the alien is also not eligible for withholding of removal. *See Zubeda v. Ashcroft*, 333 F.3d 463, 469 (3d Cir. 2003) (citation omitted). Also, while asylum is a discretionary relief, *see* 8 U.S.C. § 1154(a), withholding of removal is a relief statutorily mandated once an alien makes a showing that he or she has a well-founded fear of persecution, or a likelihood of torture, loss of freedom, or death if forced to return to the country of removal. *See* 8 U.S.C. § 1231(b)(3)(A); *Jama v. Immigrations & Customs Enforcement*, 543 U.S. 335, 348 (2005).

In *Shao*, this Honorable Court held that the "well-founded fear" requirement of 8 U.S.C. § 1101(a)(42) is not susceptible to a construction that categorically affords or denies refugee status to all Chinese nationals with more than one child. *See Shao v. Mukasey*, 546 F.3d 138, 143 (2d Cir. 2008).

The Petitioner asserts that he has met his burden of proof because his credible testimony and supporting documentation provide sufficient evidence that he has a well founded fear of government-sanctioned persecution on account of his political opposition to the China's coercive birth control policy, and that the violation will subject him to punishment in his local area. He further asserts that his well founded fear of persecution is a result of having two children in violation of China's coercive birth control policy, as well as the continued threat of being forced to undergo a sterilization procedure if forced to return to China. As such, he asserts that it is more likely than not that he will be persecuted in the event that he is forced to return.

The BIA's error was further advanced by the Second Circuit's egregious departure from the accepted and usual course of judicial proceedings by granting Respondent's motion for summary denial of the instant petition for review which is clearly meritorious and warrants specific review.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

Charles Christophe, Esq.
Counsel of Record
CHRISTOPHE LAW GROUP, P.C.
2 Wall Street, 8th Floor
New York, New York 10005
(212) 344-3800
christopheesq@aol.com

Counsel for Petitioner

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Appendix D: Oral Decision of the Immigration Judge, Department of Justice, Office for Immigration Review, Immigration Court, (June 9, 2006) 11a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 09-0638-ag

[Filed November 23, 2010]

Jien-Ron Zhang,	)
	)
Petitioner,	)
	)
v.	)
	)
Eric Holder, U.S. Attorney General,	)
	)
Respondent.	)
	)

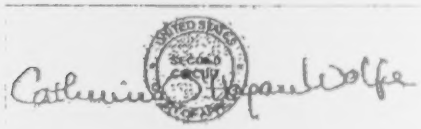
At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of November, two thousand ten.

Before: Dennis Jacobs,
Chief Judge,
Jon O. Newman,
Pierre N. Leval,
Circuit Judges.

ORDER

IT IS HEREBY ORDERED that Petitioner's motion for reconsideration of the summary denial of the petition for review is DENIED.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk



Judy Pisnanont, Motions Staff Attorney

APPENDIX B

MANDATE

BIA
Weisel, IJ
A071 569 045

United States Court of Appeals
FOR THE
SECOND CIRCUIT

09-0638-AG
NAC

[Filed May 18, 2010]

Jien-Ron Zhang,	)
Petitioner,	)
	)
v.	)
	)
Eric H. Holder, Jr.,	)
United States Attorney General,	)
Respondent.	)
	)

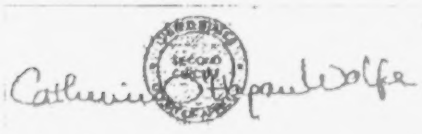
At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of May, two thousand and ten.

Present:
Dennis Jacobs,
Chief Judge,
Jon O. Newman,
Pierre N. Leval,
Circuit Judges.

Petitioner seeks review of an order of the Board of Immigration Appeals affirming the decision of an immigration judge denying his application for asylum, withholding of removal, and relief under the Convention Against Torture. Respondent has filed a motion for summary denial of the petition for review. Upon due consideration, it is ORDERED that Respondent's motion is GRANTED and the petition for review is DENIED. *See Pillay v. INS,* 45 F.3d 14, 16-17 (2d Cir. 1995). Petitioner's arguments are foreclosed by this Court's decision in *Jian Hui Shao v. Mukasey*, 546 F.3d 138 (2d Cir. 2008).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit



MANDATE ISSUED ON 12/09/2010

APPENDIX C

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Feng, David X., Esquire
401 Broadway, Suite 1900
New York, NY 10013-0000

Office of the District Counsel/NYC
26 Federal Plaza, Room 1130
New York, NY 10278

Name: ZHANG, JIEN-RON **A071-569-045**

Date of this notice: 1/30/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A071 569 045 - New York, NY Date JAN 30 2009

In re: JIEN-RON ZHANG

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT:
David X. Feng, Esquire

EXCLUDABLE: Sec. 212(a)(5)(A)(i), I&N Act [8 U.S.C. § 1182(a)(5)(A)(i)] - No valid labor certification

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182 (a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The applicant, a native and citizen of China, appeals the June 9, 2006, denial of his application for asylum, withholding of removal, and protection under the Convention Against Torture. He asserts a well-

founded fear of persecution on account of the birth of his two children in the United States in claimed violation of China's population control law. He further asserts that his daughter, who is blind and suffers from congenital birth defects, will be unable to obtain medical treatment in China. The appeal is dismissed.

As an initial matter, since the applicant is in exclusion proceedings, he is ineligible for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The applicant requests a remand for repapering under section 309(c)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), so he may seek this form of relief. Under section 309(c)(3) of IIRIRA, the Attorney General may elect to terminate deportation proceedings, in which there has not been a final administrative decision, and reinstate the proceedings as removal proceedings. The applicant cites no authority in support of his claim that he is eligible for repapering.[1] Moreover, he did not request it below. Thus, the applicant has not shown that a remand to consider repapering is appropriate.

Turning to the asylum claim, we acknowledge the seriousness of the medical conditions of the applicant's daughter (I.J. at 2-3). However, the applicant does not challenge the holding that a possible lack of comparable medical care for his daughter in China

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[1] To be eligible for repapering, an alien must show that he was eligible for suspension of deportation but for the application of the stop-time rule. However, aliens in exclusion proceedings are ineligible for suspension of deportation. *See Tanov v. I.N.S.*, 443 F.3d 195, 199 (2d Cir. 2006).

does not form the basis for a grant of asylum or withholding of removal (I.J. at 2-3, 5-6). *See* 8 C.F.R. §§ 1208.13(b) and 1208.16(b). Hence, we find no reversible error in the denial of these forms of relief with respect to the United States citizen daughter's medical concerns.

The applicant further asserts a well-founded fear of persecution in the form of forced sterilization (or forced abortion of his spouse) because he has fathered more than one Child in claimed violation of China's family planning law. A native and citizen of China who has fathered or given birth to United States citizen children may qualify as a refugee by presenting evidence establishing that the births violated family planning policies in that alien's local province, municipality, or other locally-defined area, and that current local family planning enforcement efforts would give rise to a well-founded fear of persecution because of the violation. *Matter of J-H-S-*, 24 I&N Dec. 196, 197-98 (BIA 2007); *see also Shao v. Mukasey*, 546 F.3d 138, 142-43 (2d Cir. 2008)(finding no legal error in the evidentiary framework set forth by the Board in *Matter of J-H-S-*, *supra*, for determining whether an alien, who has fathered or given birth to more children than are authorized under Chinese family planning laws, has established an objectively reasonable fear of persecution). This is a case-by-case inquiry and we have found no pattern or practice of persecution by the Chinese government against applicants on account of the birth of children in the United States. *Matter of J-H-S-*, *supra,* at 197-98; *Matter of J-W-S-*, 24 I&N Dec. 185, 190-91 (BIA 2007); *see also Shao v. Mukasey, supra,* at 174; *Matter of S-Y-G-*, 24 I&N Dec. 247 (BIA 2007) (holding that the alien did not meet the heavy burden to show that her proffered evidence demon-

strated material changed circumstances arising in China, so as to fall within the exception to the time and numerical limitations for motions to reopen set forth at 8 C.F.R. § 1003.2(c)(3)(ii), where the relevant documents submitted reflected general birth planning policies in the alien's home province that were insufficient to support a *prima facie* showing of eligibility for asylum based on the birth of a second child in the United States).

The applicant only generally avers that the background information regarding his locality's family planning policy has not been given proper weight. We disagree. The documents regarding China's population control law are general in nature and cumulative of documentation analyzed in our recently published decisions. *See generally Matter of J-H-S-*, *supra*; *Matter of J-W-S-*, *supra*; *Matter of S-Y-G-*, *supra*; *see also Matter of C-C-*, 23 I&N Dec. 899 (BIA 2006). In this regard, the applicant's evidence, in addition to the documentation assessed in our published cases, does not demonstrate that forcible sterilizations are mandated in his home province after the birth of a second United States citizen child. *See Matter of J-W-S-*, *supra*, at 192-94; *Matter of S-Y-G*, *supra*, at 254-57; *see also Shao v. Mukasey*, *supra*, at 165-66, 170-72. Indeed, the evidence establishes no uniform policy regarding the implementation of the population control law with respect to children born outside of China. *See Matter of J-W-S-*, *supra*, at 189-94; *Matter of S-Y-G-*, *supra*, at 254-57; *see also Shao v. Mukasey*, *supra*, at 163-66, 170-72. While some individuals may be subject to economic penalties or sanctions for such births, the evidence does not establish penalties or sanctions rising to the level of persecution. *See Matter of J-H-S-*, *supra*, at 200; *Matter of J-W-S-*, *supra*, at

190-91; *Matter of S-Y-G-*, *supra*, at 256; *see also Shao v. Mukasey*, *supra*, at 161-62, 164, 172. Additionally, the applicant has not presented any credible, individualized evidence demonstrating that he has reason to fear being persecuted.

For these reasons, we find no reversible error in the denial of asylum. *See* 8 C.F.R. § 1208.13(a); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *see also Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008). Moreover, since the applicant has not demonstrated a well-founded fear of persecution, he cannot satisfy the higher burden of proof for obtaining withholding of removal. *See* 8 C.F.R. § 1208.16(b); *INS v. Stevie*, 467 U.S. 407 (1984). With regard to protection under the Convention Against Torture, we find that the facts do not demonstrate that the applicant would more likely than not be tortured in China, by or with the acquiescence of a public official or other person acting in an official capacity. *See* 8 C.F.R. §§ 1208.16(c) and 1208.18(a); *Wang v. Ashcroft*, 320 F.3d 130, 133-34 (2d Cir. 2003); *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008). He has not claimed to have been tortured in the past or identified any reason why he would be singled out for such treatment in the future.

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

/s/ Roger A. Pauley
FOR THE BOARD

APPENDIX D

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT

New York, New York

File A 71 569 045

[Date: June 9, 2006]

In the Matter of	)	
	)	
JIEN-RON ZHANG	)	IN EXCLUSION
	)	PROCEEDINGS
Respondent	)	
	)	

CHARGE:

APPLICATIONS: Political Asylum, Withholding under the Act, and Withholding under Article III of the Convention Against Torture

APPEARANCES:

ON BEHALF OF RESPONDENT:

David Feng, Esquire

ON BEHALF OF THE DEPARTMENT
OF HOMELAND SECURITY:

Fen Lu, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a native and citizen of the People's Republic of China. Respondent was placed in Exclusion proceedings by the United States Government. At a subsequent hearing, Respondent admitted the allegations of fact contained therein and conceded that he was Excludable. Exclusion is established by the preponderance of the evidence.

The Applicant has filed an Application for relief. He has filed an Application for Political Asylum, and this shall also be considered as an Application for Withholding of Removal both under the Act and under Article III of the Convention Against Torture.

To be eligible for Political Asylum, he must establish past persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. To be eligible for Withholding, it must be shown that it is clearly probable that one's life or freedom would be threatened on account of the enumerated factors listed in section 101(a) (42) (A) of the Act. To be eligible for Withholding under Article III, it must be shown that it is clearly probable that one would be tortured for any reason with the acquiescence of a governmental entity.

The Respondent testified in support of his Application that he was born on September 20, 1974,

in China. The Respondent recalled he came to the United States on October 19, 1991, and married on July 7, 2000. He indicated his wife is a national of the People's Republic of China. He stated he has two children, a son born on July 21, 2000, and a daughter on August 9, 2005. Both of these children were born in the United States. The Respondent testified and the record bears out and corroborates the existence of significant and debilitating physical, congenital anomalies of within the second child including blindness, a heart condition, problems with the intestinal tract, et cetera.

The Respondent testified that his daughter receives physical therapy eight times a week and also a nurse comes once a week to adjust feeding. She is also treated at a hospital. Respondent indicated that they want more children. He testified that it is impossible to have more children in China. He related his parents have told him that he would face fines and be sterilized. In fact, he stated his mother was sterilized after her third child was born. The Respondent testified that if he returns to China, he will be sterilized and his wife would be aborted. On cross-examination, the Respondent testified that considering the second child was handicapped, the government would not allow the birth of the second child. He stated again that his parents told him that fact. He also indicated that his wife had prenatal care. However, it was not discovered until after the birth the child had significant physical impairments.

On redirect examination, the Respondent re-emphasized that the first child is a male. The Chinese government under the family planning policy will not allow a couple to have a second child.

There is no dispute that the Respondent's second child suffers from significant physical disabilities. The child is currently receiving care in the United States, extensive care, including physical therapy and nursing care on a daily to weekly basis. It is the Respondent's contention that if he returns to China, he will be sterilized and his wife will be aborted. He also insists that regardless of his daughter's special needs and her significant impairments, the government would not allow them to have another child. He also testified that he and his wife would like to have more children.

The Respondent's wife is not here to testify. However, an ample explanation has been offered as to why she is not present. The Respondent indicated that his wife takes care of their child and therefore was unable to attend today's hearing. Certainly considering the medical evidence, it is apparent that it would have placed extraordinary strains on the Respondent's family to have the Respondent's wife come in today. However, there is no affidavit from her and that is more troubling. The court, however, will view the absence of an affidavit as a minor omission, not determinative regarding whether the Respondent is credible.

It is the Court's conclusion the Respondent is not entitled to Political Asylum. The Respondent was never persecuted in China. There is no indication that he was ever harmed when he was there. However the Respondent asserts a well-founded fear of harm if he and his wife return to China with their two children. Aside from a written statement from his mother-in-law (please see Exhibit 10) as well as the Respondent's assertion that he has received information from his mother regarding family planning policy, there is no

other information regarding what would happen to the Respondent if he and his wife returned to China. In the Court's view, looking and analyzing the Respondent's Application, the Respondent's fear emanates from not being able to access the type of medical care that his child currently receives in the United States if they return to China. The focus of the narrative portion of the Application clearly relates to an apprehension on the part of the Respondent that because of the nature and the seriousness of the daughter's health and the requirement to receive significant medical care and attention, that this will not be available. This is the basis. The Respondent also asserts that he and his wife will suffer penalties under the family planning policy. However, there is no substantial evidence that that would happen. The Court acknowledges Exhibit 15-3 through 5. However, that in and of itself is not sufficient. Jian Xing Huang, 421 F.3d 125 (2nd Cir. 2005) found that individuals who had U.S.-born children were not able to establish persecution or be subjected to persecution on account of two U.S.-born children absent [indiscernible]. A letter from the Respondent's mother showing that she was victimized by the family planning policy 20 years ago, coupled with the background reports which the Court views as equivocal, did not establish solid support that the Respondent and his wife would suffer under the family planning policy. The Court concludes therefore the Respondent is not entitled to Political Asylum. Of course, the Court finds the Respondent to be credible, and the Court sympathizes with the tragic nature of this family and the tragic illness that the Respondent's young daughter has with all its concomitant vicissitudes. However, unfortunately, this is not a Cancellation of Removal Application. If it were, the court would in all probability find this

meritorious. I therefore deny Asylum. I also deny Withholding under the Act as that requires a higher standard of proof. As it relates to the issue of relief under the Torture Convention, to establish relief under the Torture Convention, one must establish the Respondent will be tortured as a matter of clear probability with the acquiescence of a governmental entity. In this case, the Respondent is offering no evidence that anyone would want to torture him if he returns to the People's Republic of China. I therefore order that all the Applications be denied and I order his Exclusion from the United States.

ROBERT D. WEISEL
Immigration Judge